

1 MAYER BROWN LLP
Edward D. Johnson (SBN 189475)
2 Elspeth V. Hansen (SBN 292193)
Two Palo Alto Square, Suite 300
3 3000 El Camino Real
Palo Alto, CA 94306-2112
4 wjohnson@mayerbrown.com
ehansen@mayerbrown.com
5 Telephone: (650) 331-2000
Facsimile: (650) 331-2060

6
7 Michael L. Lindinger (*pro hac vice*)
Marie C. Notter (*pro hac vice*)
1999 K Street, N.W.
8 Washington, D.C. 20006-1101
mlindinger@mayerbrown.com
9 mnotter@mayerbrown.com
Telephone: (202) 263-3000
10 Facsimile: (202) 263-5323

11 *Attorneys for Defendant Rhythm Management Group,*
12 *PLLC*

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16
17 MURJ, Inc., a Delaware Corporation,

18 Plaintiff,

19 vs.

20 RHYTHM MANAGEMENT GROUP,
PLLC, a District of Columbia Limited
21 Liability Company,

22 Defendant.

Case No. 5:21-cv-00072-EJD

**DEFENDANT'S REPLY IN SUPPORT OF
ITS REQUEST FOR JUDICIAL NOTICE**

Date: June 23, 2022

Time: 9:00 a.m.

Courtroom: 4, Fifth Floor

1 Rhythm's modest request for judicial notice ("Request") under Fed. R. Evid. 201 involves
2 the following publicly available material: (1) four archived versions of Murj's website from the
3 Internet Archive's *Wayback Machine* 2017-2018, supported by a notarized affidavit; (2) seven
4 Twitter posts and images therein; and (3) an industry publication. In its Order dismissing Murj's
5 Amended Complaint, the Court noted that there was no evidence that the Murj Platform,
6 including images of the same in the Amended Complaint, was publicly disclosed prior to Rhythm
7 executing the Agreement in August 2018. *See* Dkt. 43 at 6:16-23. Murj included the same
8 images and functionality description in its Second Amended Complaint (SAC) to support that the
9 Murj Platform is confidential. However, the indisputably accurate and readily discernable
10 information presented in Rhythm's Request responds to the Court's comment and demonstrates
11 that the Murj Platform was, in fact, publicly available prior to the execution of the Agreement.

12 The inquiry on a request for judicial notice is narrow. Under Federal Rule of Evidence
13 201(b), judicial notice is proper if the facts requested to be noticed are "not subject to reasonable
14 dispute" because they "can be accurately and readily determined from sources whose accuracy
15 cannot reasonably be questioned." Fed. R. Evid. 201(b). If a party requests judicial notice and
16 provides the required information a court "must take judicial notice." Fed. R. Evid. 201(c).

17 Rhythm's request for judicial notice was similarly narrow. Contrary to Murj's arguments,
18 Rhythm expressly requested judicial notice of the fact that specific images and information of the
19 Murj Platform posted on the Murj website and on Twitter were publicly available. *See* Dkt. 49-1
20 ("Rhythm does not request judicial notice of any disputed fact contained in these publications or
21 images contained therein. Rather, Rhythm respectfully requests that the Court take judicial notice
22 of the fact that the information, contained in Exhibits 1-9 of the Declaration of Michael L.
23 Lindinger, was publicly available before the parties signed the Agreement in August 2018.").
24 Rhythm's request is no different than this Court's decision in *Diaz v. Intuit, Inc.*, a case cited by
25 Murj, to take judicial notice of various publications, including relevant webpages and press
26 releases, "were in the public realm at the time they were issued, but not for the truth of their

1 contents.” *See* No. 5:15-CV-01778-EJD, 2018 WL 2215790, at *3 (N.D. Cal. May 15, 2018).

2 Murj offers no reason why these sources are not accurate under Fed. R. Evid. 201(b).
3 Rather, Murj argues that “[t]here are significant factual issues relating to the information
4 identified . . . including what information was disclosed (if any), the significant of any such
5 information, and the role that information has relative [to] creating the Rhythm Platform.” Dkt.
6 51 at 4. But there is no factual issue about what information was publicly disclosed—the
7 information disclosed is clearly depicted in each image within a particular source. The fact that
8 Murj was providing demonstrations of the Murj Platform is also undisputed. Murj can argue
9 about the import of those facts, but Murj cannot dispute that it publicly demonstrated its product
10 at multiple industry conferences, released photos of the Murj Platform, and did so before Rhythm
11 signed the Agreement in August 2018. The indisputably public nature of that information is clear
12 from the face of the sources that Rhythm requested the Court take judicial notice of.

13 None of Murj’s attempts to distinguish Rhythm’s authority changes that. Even accepting
14 Murj’s characterization of the cases, several cases “concerned the general similarity in appearance
15 of a webpage at two different points in time.” Dkt. 51 at 2-3 (citing *Erickson v. Neb. Mach. Co.*,
16 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015); *Tompkins v. 23andMe, Inc.*, 2014 WL
17 2903752, at *1 n.1 (N.D. Cal. June 25, 2104); *Craigslist, Inc. v. Dealercmo, Inc.*, 2017 WL
18 6334142, at *3 n.3 (N.D. Cal. Apr. 11, 2017). That is not materially different from what Rhythm
19 asks the Court to do—take judicial notice of the similarity between publicly-available images on
20 a website compared to the images in Murj’s Second Amended Complaint (SAC) that form the
21 basis of Murj’s confidentiality claim.

22 Murj made repeated statements in its SAC regarding the alleged confidential nature of the
23 Murj Platform. That those statements are being challenged in Rhythm’s Motion, supported by
24 Murj’s own public statements and behavior in the Request materials does not transform Rhythm’s
25 Motion into one for summary judgment. That interpretation is wrong.

26 Murj’s distinguishing of *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592
27

1 F.3d 954 (9th Cir. 2009) is especially perplexing. As Murj repeats, *Von Saher* specifically held
2 that a court could take judicial notice of “what was in the public realm at the time.” *Id.* at 960.
3 That is exactly what Rhythm has requested. Murj attempts to rely on language in *Von Saher* that
4 courts cannot, on a request for a judicial notice, decide “whether the contents” of the noticed
5 documents “were in fact true.” *Id.* Murj offers no explanation for why, or how, the contents of
6 screenshots of its own website—verified through the Wayback Machine affidavit—or images of
7 its employees at industry conferences demonstrating the Murj Platform, many of which were
8 posted on Murj’s own Twitter page, would not be true.

9 For the reasons Rhythm set forth in its Reply Brief filed concurrently herewith, Rhythm
10 disagrees that there is a disputed factual issue based on these documents, but that is a question of
11 what conclusions can be drawn on a motion to dismiss; it does not affect the Court’s ability to
12 take judicial notice of these documents.

13 Neither *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) nor
14 *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025 (N.D. Cal. 2018) cited by Murj support denying
15 Rhythm’s Request. *Khoja* involved a request for judicial notice of an investor transcript where
16 there existed a host of vague references that were subject to varying interpretations. *See Khoja*,
17 899 F.3d at 999-1000. That is not the case here where the images and functionality information
18 from the Request sources—the same image and functionality in the SAC—demonstrate that the
19 Murj Platform was not confidential. Similarly, the defendant in *Rollins* asked the court to take
20 judicial notice of information on websites and to do so for the facts that those webpages
21 established. *Rollins*, 338 F. Supp. 3d at 1031. For example, the defendants, a healthcare provider
22 and related persons, submitted a copy of the providers’ mission statement to attempt to show it
23 was affiliated with a church. *Id.* That necessarily required evaluating the truth of the contents of
24 the mission statement. Evaluating a mission statement is a far cry from noticing whether an
25 image was publicly available at a particular time.

1 **CONCLUSION**

2 For the reasons stated in Rhythm's Request and herein, the Court should take judicial
3 notice of Exhibits 1-9 attached to the Declaration of Michael L. Lindinger.

4
5
6 Dated: January 28, 2022

Respectfully submitted,

7
8 /s/ Edward D. Johnson
MAYER BROWN LLP
Edward D. Johnson (SBN 189475)
9 Elspeth V. Hansen (SBN 292193)
Two Palo Alto Square, Suite 300
10 3000 El Camino Real
Palo Alto, CA 94306-2112
11 wjohnson@mayerbrown.com
ehansen@mayerbrown.com
12 Telephone: (650) 331-2000
Facsimile: (650) 331-2060

13
14 Michael L. Lindinger (*pro hac vice*)
Marie C. Notter (*pro hac vice*)
15 1999 K Street, N.W.
Washington, D.C. 20006-1101
16 mlindinger@mayerbrown.com
mnotter@mayerbrown.com
17 Telephone: (202) 263-3000
Facsimile: (202) 263-5323

18 *Attorneys for Defendant Rhythm Management Group,*
19 *PLLC*